

## United States District Court, Northern District of Illinois

(10)

Name of Assigned Judge or Magistrate Judge	James B. Moran	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	00 C 736	DATE	7/13/2000
CASE TITLE	Village of Lake Barrington vs. Koch Materials Co. et al.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

**MOTION:****Memorandum Opinion and Order****DOCKET ENTRY:**

- (1)  Filed motion of [ use listing in "Motion" box above.]
- (2)  Brief in support of motion due \_\_\_\_\_.
- (3)  Answer brief to motion due \_\_\_\_\_. Reply to answer brief due \_\_\_\_\_.
- (4)  Ruling/Hearing on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (5)  Status hearing[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (6)  Pretrial conference[held/continued to] [set for/re-set for] on \_\_\_\_\_ set for \_\_\_\_\_ at \_\_\_\_\_.
- (7)  Trial[set for/re-set for] on \_\_\_\_\_ at \_\_\_\_\_.
- (8)  [Bench/Jury trial] [Hearing] held/continued to \_\_\_\_\_ at \_\_\_\_\_.
- (9)  This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]  
 FRCP4(m)    General Rule 21    FRCP41(a)(1)    FRCP41(a)(2).
- (10)  [Other docket entry] Enter Memorandum Opinion and Order. We grant plaintiff leave to file its proposed amended complaint and grant Koch's motion to dismiss as to count I of the amended complaint, but deny Koch's motion as to count II. Status hearing set for August 17, 2000 at 9:45am.

- (11)  [For further detail see order attached to the original minute order.]

<input checked="" type="checkbox"/> No notices required, advised in open court.  <input type="checkbox"/> No notices required.  <input type="checkbox"/> Notices mailed by judge's staff.  <input type="checkbox"/> Notified counsel by telephone.  <input type="checkbox"/> Docketing to mail notices.  <input type="checkbox"/> Mail AO 450 form.  <input type="checkbox"/> Copy to judge/magistrate judge.	WAH  courtroom deputy's initials	00:2 Rd 41 100 00  Date/time received in central Clerk's Office	number of notices	Document Number  JUL 17 2000 date docketed  ✓ docketing deputy initials  date mailed notice  mailing deputy initials
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

VILLAGE OF LAKE BARRINGTON, )  
                                  )  
                                 Plaintiff, )  
                                  )  
                                 vs.         )      No. 00 C 736  
                                  )  
KOCH MATERIALS COMPANY, et al., )  
                                  )  
                                 Defendants. )

**MEMORANDUM OPINION AND ORDER**

Plaintiff Village of Lake Barrington brings this diversity action against defendants Koch Materials Company (Koch) and Curran Contracting Company (Curran), alleging negligent misrepresentation and fraud. Koch moves to dismiss both counts of the complaint for failure to state a claim while plaintiff seeks to file an amended complaint. For the reasons set forth below, plaintiff is given leave to file its amended complaint, but the negligent misrepresentation claim contained therein is dismissed.

**DOCKETED**  
**JUL 17 2000**

**BACKGROUND**

Koch is a Delaware corporation in the business of manufacturing and supplying road building materials. In 1998, representatives of Koch marketed one of its products, a polymer modified asphalt cement binder (PMAC), to plaintiff. Through sales meetings, product brochures, site visits, and telephone conversations, Koch promoted PMAC as a product that would reduce and/or slow pavement cracking if used when resurfacing city streets. Plaintiff was sold on the product and required the use of PMAC in public bidding documents for its 1998 Road Improvement Project. Curran won the bid for that project and contracted with plaintiff to resurface approximately 3.3 miles of plaintiff's streets utilizing Koch's PMAC

product. The resurfacing work was completed in September and October 1998. According to the complaint, plaintiff's streets began cracking by January 1999, only three months after being resurfaced using PMAC. Plaintiff ultimately installed new pavement along the 3.3 miles of city streets in the spring of 1999.

Upset with the performance of PMAC, plaintiff sued Koch and Curran in state court on December 30, 1999, alleging negligent misrepresentation (count I) and common law fraud (count II). The lawsuit was removed to federal court on February 4, 2000. Koch thereafter filed a motion to dismiss the complaint for failure to state a claim. *See Fedel Rule of Civil Procedure 12(b)(6)*. Koch argues that it is not in the business of supplying information and therefore cannot be held liable for negligent misrepresentation under Illinois law. Koch further asserts that the complaint fails to plead fraud with particularity, as required under Fed.R.Civ.P. 9(b). In response to Koch's motion plaintiff submitted a proposed amended complaint which, according to plaintiff, cures the defects upon which Koch relies. Koch maintains that the proposed amended complaint, like the original complaint, fails to state a claim and therefore should be dismissed. We agree that plaintiff cannot state a claim for negligent misrepresentation, warranting dismissal of count I, but find that the proposed amended complaint alleges fraud with sufficient particularity such that count II survives.

## DISCUSSION

### I. Negligent Misrepresentation

Under Illinois law a defendant may be liable for negligent misrepresentation only if it "is in the business of supplying information for the guidance of others in their business transactions." Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443, 452 (Ill. 1982); *see*

Orix Credit Alliance, Inc. v. Taylor Machine Works, Inc., 125 F.3d 468, 475 (7th Cir. 1997). Koch argues that it is in the business of supplying road building materials, not informational services, and therefore outside the scope of a negligent misrepresentation claim. The case law supports this argument. Courts applying Illinois law consistently have rejected negligent misrepresentation claims brought against manufacturers of tangible, noninformational goods, on the grounds that they are not in the business of supplying information. *See, e.g., Orix*, 125 F.3d at 475-77; Coleman Cable Systems, Inc. v. Shell Oil Co., 847 F. Supp. 93, 95-96 (N.D. Ill. 1994) (collecting cases); Knox College v. Celotex Corp., 453 N.E.2d 8, 11 (Ill. App. 3 Dist. 1983). Of course, the cases are not all cut-and-dry. Most producers of tangible goods also provide information to their customers. In such circumstances, Illinois courts make a case-by-case determination of whether a party is in the business of selling goods or of supplying information, with focus on “whether the information furnished with the noninformational goods was central to the business transaction” or “merely incidental to the sale of goods.” Coleman, 847 F. Supp. at 95-96; *see Orix*, 125 F.3d at 475-76; Rosenstein v. Standard & Poor’s Corp., 636 N.E.2d 665, 668 (Ill. App. 1 Dist.), *appeal denied*, 622 N.E.2d 1227 (Ill. 1993).

Koch’s products, including PMAC, are tangible goods. Insofar as Koch provides information in connection with the marketing and sale of PMAC, that information is only incidental to Koch’s primary objective of selling PMAC. The case law teaches us that this common business practice does not transform Koch into a supplier of business information such that negligent misrepresentation liability is triggered. *See Orix*, 125 F.3d at 475-76 (supplier of machine not liable for alleged misrepresentations regarding appraisal of machine); Coleman, 847 F. Supp. at 95-96 (supplier of plastic insulation not liable for alleged

misrepresentations regarding compatibility of insulation with other compounds); Knox, 453 N.E.2d at 11 (supplier of roofing materials not liable for alleged misrepresentations regarding quality of product). To the contrary, as a supplier of noninformational goods, Koch cannot be subject to a negligent misrepresentation cause of action.

In an attempt to salvage its claim, plaintiff alleges in its proposed amended complaint that Koch “is a supplier of road building materials, but is also in the business of supplying information for the guidance of others and other services relative to road construction” (am. cplt., ¶4). The addition of this allegation is unavailing, for the remainder of the complaint confirms that Koch provided information only as a means of marketing its PMAC product. For example, in paragraph 5, plaintiff alleges that “Koch made representations to and provided information to [plaintiff] relative to the selection, use and application of Koch’s [PMAC] as a road material … fit for the purpose of reducing and/or slowing pavement cracking ….” (am. cplt., ¶5). There is no indication that Koch provided informational services to plaintiff apart from its marketing and sale of PMAC. To the contrary, the allegations state that Koch sold PMAC to plaintiff and that any information supplied in connection with the sale of that tangible product took the form of advertising and marketing efforts on the part of Koch. “Manufacturers in all industries must advertise to sell their products,” but these advertisements cannot form the basis for recovery “under the theory of negligent misrepresentation.” Coleman, 847 F. Supp. at 96; see Orix, 125 F.3d at 476. Count I is dismissed.

## II. Fraud

Count II alleges fraud based on Koch’s alleged misrepresentations regarding the

suitability and quality of its PMAC product. In its opening brief Koch argued that plaintiff had failed to plead fraud with sufficient particularity, as required by Fed.R.Civ.P. 9(b) (requiring that “the circumstances constituting fraud ... shall be stated with particularity”). Plaintiff responded to this challenge by submitting a proposed amended complaint which alleges additional details regarding the allegedly fraudulent misrepresentations made by Koch. The proposed amended complaint cites the specific dates on which the alleged misrepresentations were made, identifies the officials who made the statements, and describes the nature of those communications (am. cplt., ¶5). These allegations satisfy the general requirements of Rule 9(b). *See Uni\*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992) (holding that plaintiff “must plead the ‘who, what, when, and where’ of the alleged fraud”).

Notwithstanding the proposed amendments to the complaint, Koch argues that the allegations raised in count II continue to be deficient. In order to state a claim of fraudulent misrepresentation, plaintiff must allege, *inter alia*, that Koch made a false statement of material fact. *Konnick v. Suzuki Motor Co., Ltd.*, 675 N.E.2d 584, 591 (Ill. 1996). Koch contends that plaintiff has failed to plead this essential element of fraud. Koch argues that the allegedly false statements identified by plaintiff are not factual representations, but rather are statements of commendation or opinion regarding the quality of PMAC and therefore cannot support a fraud claim. Koch relies on Illinois case law holding that a party’s opinions regarding the future performance or quality of its products cannot constitute fraud. *See Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1298 (7th Cir. 1993); *People ex rel. Peters v. Murphy-Knight*, 618 N.E.2d 459, 463-64 (Ill. App. 1 Dist. 1993) (“statements which are nothing

more than a recommendation of one's product are not representations of fact"); Spiegel v. Sharp Electronics Corp., 466 N.E.2d 1040, 1044 (Ill. App. 1 Dist. 1984). However, while a fraud claim cannot be based on mere puffery, marketing statements that are representations of existing facts, rather than promises of future performance, are actionable under a fraud theory. See MAN Roland Inc. v. Quantum Color Corp., 57 F. Supp. 2d 576, 583-84 (N.D. Ill. 1999); Budget Rent A Car Corp. v. Genesys Software Systems, Inc., 1996 WL 480388, at \*4 (N.D. Ill. Aug. 22, 1996); Murphy-Knight, 618 N.E.2d at 464-65.

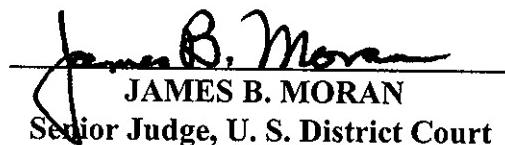
Reviewing the allegations raised in the proposed amended complaint, we find that plaintiff has identified factual representations regarding the function of PMAC, and not just assurances of the product's quality. According to the complaint, Koch informed plaintiff that PMAC "was suitable, useful, appropriate, and fit for the purpose of reducing, and/or slowing pavement cracking" and that PMAC "would be appropriate, effective and useful where pavement cracking had occurred on numerous streets of the Village of Lake Barrington" (am. cplt., ¶5). Moreover, plaintiff alleges that Koch's representations regarding PMAC were made after Koch inspectors personally had examined the city streets at issue and determined that PMAC was the appropriate product for plaintiff's resurfacing project (am.cplt., ¶5). Koch's alleged statements go beyond mere puffery and enter the realm of fact. More than just promises regarding the future quality of PMAC, the representations at issue here concern the existing ability of PMAC to reduce pavement cracking. These allegations are sufficient to state a claim of fraudulent misrepresentation. See Cold Spring Granite Co. v. Information Management Associates, Inc., 1999 WL 1249337, at \*2-3 (N.D. Ill. Dec. 17, 1999); MAN Roland, 57 F. Supp. 2d at 583-84; Budget, 1996 WL 480388, at \*4. That Koch has specific

expertise regarding the science of pavement binders only reinforces the notion that it may be held liable for its representations about PMAC. See Stenograph Corp. v. Microcat Corp., 1989 WL 99543, at \*2 (N.D. Ill. Aug. 22, 1989). The fraud count survives Koch's motion to dismiss.

### CONCLUSION

For the reasons set forth above, we grant plaintiff leave to file its proposed amended complaint and grant Koch's motion to dismiss as to count I of the amended complaint, but deny Koch's motion as to count II.

July 13, 2000.

  
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JAMES B. MORAN  
Senior Judge, U. S. District Court